of the prosecuting officer. Section 316(a) of the Criminal Procedure Code provides that the judge may, in an appeal from an order of acquittal, reverse such order, and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law. In my view, this is a fit and proper case to be ordered for re-trial as the learned president had not heard all the evidence of the prosecution which he should have heard before coming to a proper conclusion.

Re-trial ordered.

Solicitors: *J. Nadchatiram & Co.*

TENGKU MAHMOOD v. PUBLIC PROSECUTOR

[A.Cr.J. (Raja Azlan Shah F.J.) January 9, 1974]
[Kota Bharu — Criminal Appeal No. 17 of 1972]

Criminal Law and Procedure — Appeal — Demeanour of witness to be tested against totality of his evidence — Evidence of accomplice — Charge of corruption — No corroboration — Whether trial court justified in convicting accused — Prevention of Corruption Act, 1961.

This was an appeal against the conviction of the appellant on a charge of accepting an illegal gratification, an offence under the Prevention of Corruption Act, 1961. The learned president of the Sessions Court had convicted the appellant on the uncorroborated evidence of the complainant, as he accepted the complainant as a witness of truth.

Held: on the facts the complainant in this case was an accomplice whose whole interest in giving evidence against the appellant must have been to make his case as black as possible to achieve his objective. Since the learned president had failed to take a critical appreciation in his examination of the complainant's evidence, he had not taken proper advantage of his having seen and heard him, so that his mistaken view had coloured his approach to the issue of credibility so gravely that there was such a misdirection that made the judgment wholly unsatisfactory. The appeal must therefore be allowed and the conviction quashed.

Cases referred to:-

(1) *Tara Singh* v. *Public Prosecutor* [1949] M.L.J. 88, 89.
(2) *Rex* v. *Ambler* (1938) 2 W.W.R. 225.
(3) *Trowell* v. *Public Prosecutor* [1946] M.L.J. 41.
(4) *Thong Hong Kee* v. *Public Prosecutor* [1952] M.L.J. 110.
(5) *Lim Kwee Geok* v. *Public Prosecutor* [1953] M.L.J. 50.

CRIMINAL APPEAL.

Edgar Joseph Jr. for the appellant.

Hashim Majid (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah F.J.: The appellant was convicted of agreeing to accept from the complainant a gratification of $800, an offence under section 4(a) of the Prevention of Corruption Act, 1961. He was sentenced to imprisonment for one day and a fine of $2,000 in default 9 months. He has appealed against conviction.

The evidence shows the salient facts of the prosecution case to be as follows: The appellant was a member of the Kelantan State Public Services Commission, who in March 1971 had interviewed the complainant for a job as tracer in the Survey Department. He was not successful. In June 1971 he made a second application. In early September 1971 he enlisted the help of an intermediary, PW6, to introduce him to the appellant. On 18 September 1971, together with PW6 he visited the appellant at his house with an offering of rice pulot and eggs. There it is said the alleged agreement to pay the appellant a sum of $800 as inducement to help him get the job was reached. The money was to be handed to PW6 in 15 days' time (3 October 1971) and the venue was the appellant's house. The complainant made a report (not produced because inadmissible) with the local branch of the Anti-Corruption Agency not immediately after the said occurrence but 13 days later (30 September 1971). A police trap was then set on 15 October 1971. $800 notes treated with anthracine were handed to the complainant with instructions to hand them to PW6 who in turn would, according to the said agreement hand them to the appellant. However, the trap proved abortive. It was alleged that the complainant handed the money to PW6 but there was no evidence to that effect. At that material time the appellant was not in his house. He returned a little later. He was searched by the police but nothing incriminating was found on him. The members of his household were also searched but with the same result. His house was meticulously searched from morning till dusk but the money was not found. In the course of the trial the credit of PW6 was impeached by the prosecution.

The central question to be considered in this appeal is whether on the record, as it stands, the learned president was right in accepting the complainant as a witness of truth.

As regards authority, there is, I think, very little to be said. It is hardly necessary to go further back than *Tara Singh* v. *Public Prosecutor*[1] in 1948. In that case it was held that impression as to demeanour of a witness must be critically tested against the totality of his evidence. Now, the learned president, it is true, had a great advantage over this court. He saw and heard the witness and I did not. But the demeanour is not always the touch-stone of truth. It is only one ingredient in arriving at a finding of credibility. But so also is motive. Although in cases of this kind it is not easy to get satisfactory evidence, one must not also lose sight of the fact that at the same time it is indeed easy to 'fix' a man in the position of the appellant. A man who was not successful before the Public Services Commission may have hurt his pride and hurt pride is a ferocious beast. It is for this reason that a judge of fact should always test the complainant's evidence against the totality of his evidence and the probabilities of the case. Failure to do so does amount, in my view, to a misdirection, and if it can be demonstrated that the trial judge had failed to do that, his conclusion as to credibility, cannot, in justice, be regarded as impeachable, much less unimpeachable. It would therefore be not just for an appellate court to regard itself as compelled to regard as conclusive his finding on the issue of credibility. The whole matter can be considered afresh. Further, the graver the issue involved, and particularly when an allegation of corruption is in the air, the greater is the necessity for the appellate court to enquire whether the conclusion as to credibility is one that must under the law be regarded as, for all practical purposes, irrefragable.

There are a number of grounds of appeal but the cumulative effect of those can compendiously be put in one sentence; that the propriety of the case does not justify a conviction on the uncorroborated evidence of the complainant.

While it is true that in a proper case a trial judge may fittingly convict on the uncorroborated evidence of an accomplice, this would be a very exceptional one. The Canadian Court of Appeal in *Rex* v. *Ambler*[2] cited by Horne J. in *Trowell* v. *Public Prosecutor*[3] is to this effect. In *Trowell's* case the accused was convicted in the Magistrate's Court of receiving illegal gratification in the course of his duty as Inspector of Machinery in the Mines Department. The only evidence that the accused received the sum of money was that of the person who alleged he paid it. He was an accomplice. Against that there was the denial on oath of the accused. Horne J. in his judgment quoted a passage from *Ambler's* case and that passage was reproduced by the learned president on page 13 of his judgment but the last sentence in that passage was not reflected in the record and it is as follows:

"There may be a case in which a trial judge may fittingly convict upon the uncorroborated evidence of an accomplice, but this would be the very exceptional case."

In *Thong Hong Kee* v. *Public Prosecutor*[4] the appellant there was also convicted on the uncorroborated evidence of the complainant. The learned magistrate was extremely impressed by the demeanour of the complainant and looked upon him as a truthful witness. He had also stated emphatically that before coming to his decision he had warned himself against convicting on the uncorroborated evidence of an accomplice. He further stated that he could not accept the evidence of the accused. It was held that while an appellate court would always hesitate to over-rule the decision of a trial judge based upon the demeanour of witnesses whom he had had the opportunity of seeing in the witness box, nevertheless would interfere with the decision if it appeared he did not give sufficient consideration to the evidence or take into consideration the great number of discrepancies and contradictions in his evidence or test it with the evidence of the only other witness against which it could be tested.

In *Lim Kwee Geok* v. *R.*,[5] a case of dishonestly receiving stolen property, to wit, 30 cases of milk, which were found in the possession of a proprietor of a shop, the only evidence against the accused was that of the proprietor who had bought the milk at a price far below the market price. He also produced his books of account but the entries showed that they were extremely suspicious. Now there the learned magistrate had failed to observe that that witness, the proprietor of the shop, was not only an accomplice but an accomplice of the very type which our courts had always looked upon as witnesses upon whose evidence it is most unsafe to convict without corroboration.

So in the present case I proceed to test the matter by reference to the totality of the complainant's evidence and the probabilities of the case. The evidence shows that the complainant was a boy of 21 years of age who had passed his L.C.E. He had high hopes of getting the job but unfortunately he was not successful. He said the members of the Board were not fair to him as he felt he had answered the questions satisfactorily. That is apparent from the record: (see page 53/54)

"I felt the members of the Board were a stumbling block to my getting the job in the Government service. The most active member of the Board was the accused. When I left the interview I had the feeling the accused had the biggest say in the Board. I would like to see the accused punished for the wrong he had done to me. The wrong he had done in preventing me from getting the job. One way of punishing him was to have him reported for corruption. I also knew after I reported I would have a stumbling block out of my way.

Q. So that if and when you applied for a job again the accused would not be present as he had been reported (Deputy Public Prosecutor objects to question). Court overrules objection.

A. Yes, so that my prospects of getting a job would be brighter."

Such is the veracity of the man whom the learned president said his credibility is beyond question. Now in June 1971 he again applied for the same post. He enlisted the help of PW6 to get to know the appellant. Exactly on what basis the complainant came to know or was brought to know PW6 was not fully developed in the evidence but at any rate it is stated that PW6 and the appellant had some relationship and there the evidence ended. So on 18th September 1971 PW6 took the complainant to see the appellant at the latter's house and there it is said the clandestine agreement was reached.

I have been urged to say that in the light of the totality of the complainant's evidence and the probabilities of the case the evidence regarding the alleged agreement was wholly unsatisfactory. It is said that there are violent discrepancies and contradictions on the matter. For present purposes it is sufficient to say that having read the body of evidence which runs to 60 pages and having anxiously read and re-read every word of the 32 page judgment, I find it impossible to hold that the assessment of the complainant's credibility was arrived at in such a manner that this court ought now to regard itself as precluded from considering it afresh. The learned president had properly directed his mind to the law on accomplice evidence, but to my mind he had paid little attention to the fact. There is in my view no microscopic scrutiny of the totality of the complainant's evidence. If that was done with an indulgent eye, one cannot avoid the conclusion that his evidence leaves very much to be desired. Here is a man, an accomplice, whose whole interest in giving evidence against the appellant must have been to make his case as black as possible in order to achieve his objective. He is an accomplice of the very type which our courts have always looked upon as a witness upon whose evidence it is most unsafe to convict without corroboration. In my judgment, since the learned president had failed to do what he was required to do, that is, to take a critical appreciation in his examination of the complainant's evidence, he had not taken proper advantage of his having seen and heard him, so that his mistaken view had coloured his approach to the issue of credibility so gravely that there was such a misdirection that made the judgment wholly unsatisfactory.

A point which at one time had caused me some anxiety is the argument of the learned Deputy Public Prosecutor that although the learned president had

convicted on the uncorroborated evidence of the accomplice based on impressive demeanour, later events, that is, the police report and the abortive trap showed that there is a logical consistency with the complainant's evidence in court. He relied on a passage in the judgment:

"There is a logical sequence, and an inherent consistency and truth about this narrative of PW1 which taken with all the surrounding circumstances makes it an exceptional case where the rule regarding corroboration of the evidence of an accomplice can be very safely departed from."

If I understand the passage correctly, it is said that the later events are conduct which had a direct bearing and connexion with the alleged agreement and such conduct is consistent with the complainant's testimony in court that he is telling the truth regarding the said agreement. If that is what the learned president meant, then I say he is clearly in error. In my opinion only the police report can be claimed to be of any evidential value so far as it relates to consistency of conduct and assertions of the complainant in court. That principle is well known in cases of rape and some other sexual offences. The said complaint can only be used as evidence of the consistency of his conduct with the story told by him in court. In other words, it can only be used as evidence of credibility of his testimony to the alleged agreement but there are limits to its admission. It must be made voluntarily and at the earliest convenient moment. It must not be made after a long lapse of 13 days as to allow fabrication.

The abortive trap is not admissible as evidence of the alleged agreement which must be proved independently. It is whether that piece of evidence taken with all other proved circumstances are strong enough to bring home the offence to the appellant beyond reasonable doubt. If those circumstances or some of them can be explained by any other hypothesis, then the appellant must have the benefit of that hypothesis.

The abortive trap is a telling factor in favour of the appellant. The 15 day-period of payment was not kept. If the alleged agreement were true then in my view the appellant or the intermediary would have confronted the complainant with payment. Further, where there are only two persons who could testify as to the alleged agreement and one of them turned hostile, that would seem to be a good reason to doubt the propriety of departing from the rule that it is wholly not safe to convict on the uncorroborated evidence of an accomplice based on demeanour alone.

In such circumstances what right have we to say that the defence story is unreasonable? If it stands together, if it is not consistent with the proved facts, a rejection of it would be simply and solely on the ground that it was told by an accused person under trial.

I have considered the case in its proper perspective. I allow the appeal and set aside the conviction and sentence. I have further directed my mind regarding a new trial and I say that this is not a fitting case so to do.

Appeal allowed.

Solicitors: *Joseph & Son.*

GOVINDARAJOO v. REGISTRAR OF CRIMINALS

[O.C.J. (Hashim Yeop A. Sani J.) January 14, 1974]
[Kuala Lumpur — Originating Motion No. 61 of 1973]

Registration of Criminals Ordinance, 1948 — Whether particulars of person found guilty under Juvenile Courts Act 1947, are registrable under the Ordinance — Interpretation — Ordinance replaced by new Registration of Criminals and Undesirable Persons Act, 1969 — Whether provisions of new Act can be looked at in interpreting the old Ordinance.

In this case the applicant applied for an order of *mandamus* to direct the Registrar of Criminals to deliver to him his finger-prints, photographs and negatives thereof taken when he was charged in the Juvenile Court, Kuala Lumpur.

Held: as the applicant could not be convicted in the Juvenile Court, the particulars of the applicant were not registrable under the Registration of Criminals Ordinance, 1948, and therefore the particulars should be returned to the applicant.

[Editorial Note: An appeal to the Federal Court was lodged by the respondent, *vide* Federal Court Civil Appeal No. 22 of 1974. The respondent has since withdrawn the appeal.]

Cases referred to:-

(1) *Kharudin* v. *Public Prosecutor* [1969] 1 M.L.J. 45.
(2) *Shannon Realties* v. *Ville de St. Michael* [1924] A.C. 185 at p. 192.

ORIGINATING MOTION.

M. Mahalingam for the applicant.

Gunn Chit Tuan (Senior Federal Counsel) for the respondent.

Hashim Yeop A. Sani J.: This is a motion by one Thangavelu s/o Ponnusamy on behalf of one Govindarajoo s/o Thangavelu, an infant, asking firstly, for an order of prohibition directed to the respondent (the Registrar of Criminals) to prohibit the latter from producing at the Magistrate's Court, Kuala Lumpur the registered particulars to the finding of guilt of Govindarajoo s/o Thangavelu at the hearing of the Magistrate's Court Summons Case No. B 181 of 1972, then pending, and secondly, for an order of mandamus directing the same respondent to deliver forthwith to the applicant his fingerprint form photographs and the negatives thereof taken from Govindarajoo s/o Thangavelu at the time when he was charged for an offence under the Penal Code at the Kuala Lumpur Juvenile Court vide Case No. J 96 of 1969.

The background to this application is as follows: The said Govindarajoo s/o Thangavelu was charged for an offence under section 379 of the Penal Code at the Kuala Lumpur Juvenile Court and on 26th April, 1969 was found guilty by the Juvenile Court and was bound over in the sum of $100 for one year under section 12(1)(d) of the Juvenile Courts Act, 1947. The said Thangavelu s/o Ponnusamy, as father, executed the bond to exercise proper care and guardianship. At the hearing of the Summons Case No. B 181 of 1972, relating to a charge under section 16(1)(a), Part III of the Second Schedule to the Federal Constitution, a certificate from the Registrar of Criminals containing the "conviction" and "sentence" as to the said Govindarajoo s/o Thangavelu in the Juvenile Court case, referred to earlier, was produced as evidence by the prosecution. It was on that day that the applicant knew for the first time that such particulars have been kept by the respondent. The applicant, through his solicitors, requested for the return of the fingerprints,